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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas, *et al.*,

Appellants,

—v.—

BRENT STEIN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

APPELLEE'S BRIEF

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INDEX

	PAGE
Statement of the Case	1
Summary of Argument	4
ARGUMENT	6
I. The Court below properly declared Article 527 unconstitutional	6
a. The Statute Punished Possession and Other Private Actions	6
b. The Statute Was Not Limited to Material Utterly Without Redeeming Social Value	7
c. The Statute Was Overbroad Because It Reached Beyond Public or Commercial Dissemination	9
d. The Statute Denied Equal Protection	10
II. The plaintiff chose an appropriate means to enforce his constitutional rights	11
a. The Court Properly Declined to Abstain	12
b. Injunctive Relief Against Future Arrests and Prosecution Was Appropriate	14
c. The Declaratory Relief Was Proper	17
CONCLUSION	19

Table of Authorities

PAGE

Cases:

Baggett v. Bullitt, 377 U.S. 360 (1964) 13
Baines v. City of Danville, 337 F.2d 579 (4th Cir., 1964), *cert. denied*, 381 U.S. 939 15

Cameron v. Johnson, 390 U.S. 611 (1968) 5, 16, 18
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 12

Dombrowski v. Pfister, 380 U.S. 479 (1965) 5, 11, 13-14, 15, 16

Ex Parte Young, 209 U.S. 123 (1908) 14

Fenster v. Leary, 264 F. Supp. 153 (S.D.N.Y., 1966), *aff'd* 386 U.S. 10 18

Golden v. Zwickler, 394 U.S. 103 (1969) 18
Gomez v. Layton, 394 F.2d 764 (D.C. Cir., 1968) 14

Hague v. CIO, 307 U.S. 496 (1939) 14
Harman v. Forssenius, 380 U.S. 528 (1965) 14

Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) 12
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 17
Kirkland v. Wallace, 403 F.2d 413 (5th Cir. 1968) 13, 18

Machesky v. Bizzell, 414 F.2d 283 (5th Cir., 1969) 16-17
Marcus v. Search Warrant, 367 U.S. 717 (1961) 11
Memoirs v. Massachusetts, 383 U.S. 413 (1965) 4, 7, 8

NAACP v. Button, 371 U.S. 415 (1963) 16

PAGE

Redmond v. United States, 384 U.S. 264 (1966) 7
Redrup v. New York, 386 U.S. 767 (1967) 8
Reetz v. Vozanich, No. 185, October Term 1969, decided February 25, 1970 14
Roth v. United States, 354 U.S. 476 (1957) 8, 9

Shapiro v. Thompson, 394 U.S. 618 (1969) 4; 10
Sheridan v. Garrison, 415 F.2d 699 (5th Cir., 1969) 17
Stanford v. Texas, 379 U.S. 476 (1965) 9, 11, 12
Stanley v. Georgia, 394 U.S. 557 (1969) 4, 7, 9, 12
Sullivan v. State, 401 S.W.2d 246 (Tex. Crim. App., 1966) 14

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 18

Williams v. Rhodes, 393 U.S. 23 (1968) 10
Wolin v. Port of New York, 392 F.2d 83 (2d Cir., 1968), *cert. denied*, 393 U.S. 940 14
Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) 13

Zemel v. Rusk, 381 U.S. 1 (1965) 18
Zwickler v. Koota, 389 U.S. 241 (1967) 5, 11, 13, 17

Constitutional Provisions:

United States Constitution

First Amendment 4, 5, 6, 8, 12, 16

Federal Statutes:

28 U.S.C. §2283 ..... 5, 15, 17, 18

28 U.S.C. §2282 17

PAGE

State Statute:

Texas Penal Code

Article 527 ..... 6, 15, 16, 17

Other Authorities:

Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421 9

The Supreme Court 1968 Term, 83 Harv. L. Rev. 7 (1969) 10

The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808 (1969) 14, 15

The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L. J. 143 (1968) 14

Sen. Rep. 1005, 73rd Cong. 2d Sess. (1934) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 565

CHARLES BATCHELOR, Chief of Police, City of Dallas, *et al.*,
Appellants,

—v.—

BRENT STEIN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

APPELLEE'S BRIEF

Statement of the Case

Appellants' brief omits or obscures certain salient facts, requiring an expanded statement of the case.

In October 1968 the Dallas police decided it was time to do something about *the "Dallas Notes"* (Snider Deposition 11,12). They were concerned with the "pornography and the newspaper in general" (App. 63). The office of the District Attorney was asked if it would "accept" an obscenity complaint (App. 63) based upon the October 16th issue of the paper (attached as Ex. 2, Snider Deposition). An Assistant District Attorney, although he did not "read it all," stated that the paper looked obscene to him (App. 63).

Armed with this assurance the Dallas police obtained a search warrant[1] authorizing a search of the residence of the publisher Stein; a portion of the residence was used as an office for the "Dallas Notes" (App. 66). The warrant authorized a search for "obscene" material (App. 11-12). During the night of October 30, a dozen police officers and trustees descended upon Stein's residence (App. 65), the officers had the foresight to provide two trucks to facilitate the search (Srider Deposition 32). Stein and five other persons on the premises were arrested and some two tons of newspapers and periodicals were seized along with four typewriters, a camera, $5.43 in money, and miscellaneous personal property (App. 13, 67).

Charges of possession of obscene matter in violation of Article 527 of the Texas Penal Code were later filed against Stein and the others arrested (App. 81). The charges were based in part upon photographs seized in Stein's bedroom (Snider Deposition 70).

On the night of November 15, 1968 the Dallas police returned to Stein's residence, forced the door (Monaghen Deposition 6), and once again searched the premises. The officers came under the guise of a "marijuana" search warrant (App. 14-15). No drugs were discovered. However, since after the first raid Stein had managed to gather equipment and resume publication, the police "cleaned house again" (App. 16, 17, 72), seizing cameras, lights, drafting tables, telephones, typewriters and miscellaneous personal property (App. 16-17). When asked why he had seized a poster of Mao Tse-tung, Officer Monaghen explained, "I

[1] The application for the warrant was presented to the magistrate while he was attending a hockey match; the magistrate was not shown a copy of the newspaper in question (App. 64).

didn't know what to seize and what not to seize so I just took everything" (App. 74). Stein was again charged with unlawful possession of obscene material. This charge was based upon issues of the newspaper and some motion picture advertising posters (Snider Deposition 91-93).

Both raids on the Stein residence were directed by Lt. Snider, the head of the Dallas vice squad. Lt. Snider considered himself empowered by Article 527 "to make on the spot determinations as to the obscenity of given material and to confiscate that material [he] deem[ed] to be obscene" (App. 68). Snider did not feel compelled to weigh the entire content of the newspapers in determining their obscenity (Snider Deposition 57-58).[2] There is no plausible argument that would justify treatment of the newspapers as obscene.

Stein sued in federal court asserting jurisdiction under Section 1343, and alleging unsuccessful attempts to recover the confiscated property. He sought a preliminary injunction requiring return of the seized material, an injunction against future police harassment and against the prosecution of the pending criminal cases as well as a declaration that Article 527 was unconstitutional. The filing of the suit resulted in the return by the Dallas police of the material confiscated in the two raids,[3] including such items as credit cards, costume jewelry, cans of spices, a brown sweater, and a "statue of a man and woman in an embrace." Amended pleadings deleted the prayer for injunction

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[2] The search warrant for the October 15th raid alleged that "this newspaper contained obscene four (4) letter words" (App. 10).

[3] A full list of the seized items that were returned appears as Exhibits 3, 4, 14 and 15 to the Snider Deposition.

against pending prosecutions and sought only injunctive relief against future arrests and prosecutions under Article 527 and a declaration that the statute was unconstitutional (App. 77-78). Plaintiff moved for partial summary judgment, urging in support an intention to continue publication of the "Dallas Notes" in a similar vein (App. 59-61). The three-judge court granted summary judgment, declaring Article 527 unconstitutional and enjoining future enforcement of the statute. The Court did not enjoin the state from pressing its pending prosecutions against Stein.

Summary of Argument

The court below properly ruled the Texas obscenity statute unconstitutional on its face. A statute which punishes mere private possession of obscene material as well as other purely private activities is an unwarranted intrusion into the area of private speech protected by the First Amendment. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Moreover, the statute did not limit its application to material "utterly without redeeming social value," a standard which is constitutionally mandated to prevent unwarranted encroachments upon protected speech. *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1965). Finally, the Texas statute was constitutionally overbroad in that it proscribed obscenity, with respect to adults, in contexts other than public or commercial dissemination, the only context in which the State can demonstrate sufficient interest to justify regulation.

In addition to these First Amendment deficiencies, the statutory exemption of "daily or weekly newspapers," serving no compelling state interest, is a denial of equal protection of the laws. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

The assumption of jurisdiction and grant of relief by the court below was consonant with the applicable principles fashioned by this Court. The Plaintiff chose an appropriate means to enforce his constitutional rights which were threatened by the existence of the Texas obscenity statute and the overbearing means chosen to enforce it. Indeed, this case demonstrates the vitality of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) and the remedies it contemplated. The lower court quite properly declined to abstain where, as here, the state statute was not fairly subject to an interpretation that would "avoid or modify the constitutional question," *Zwickler* v. *Koota*, 389 U.S. 241 (1967). In addition, the grant of injunctive relief against future prosecutions did not offend Section 2283 of Title 28, U.S.C. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cameron* v. *Johnson*, 390 U.S. 611 (1968). The injunctive relief applied only to future prosecutions and did not inhibit the state from pursuing the pending prosecutions against the appellee. At the very least, declaratory relief was appropriate for it did not present the conflict with the state processes which may result from injunctive relief and, indeed, is required in a case such as this which involves an overbroad state statute impinging upon First Amendment freedoms.

ARGUMENT

I.

The Court below properly declared Article 527 unconstitutional.

The Attorney General's brief suggests a number of tantalizing problems for resolution (Appellants' brief, p. 18); this appeal, however, may be resolved without embarking upon such a full scale reexamination of obscenity and the First Amendment. Similarly, the questions presented may be answered without accepting the invitation to consider "curbing and curtailing" the freedom of speech and expression (Appellants' brief, p. 21).

a. *The Statute Punished Possession and Other Private Actions.*

The determination below was limited to "whether the statute is constitutionally defective on its face" (App. 85). The statute described the crime as follows:

> whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or *have in his possession or under his control* . . . any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photographs, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording or presentation, or other article which is obscene . . . (emphasis added).

In light of *Stanley* v. *Georgia,* 394 U.S. 557 (1969), the Court was compelled to hold that "the above section is clearly unconstitutional in so far as it makes mere possession of obscene material a crime" (App. 85). The criminal charges against Stein, arising as they did in the context of possession, properly presented this aspect of the overbreadth of the Texas statute.

Stanley also persuaded the court that "in the context of 'private' expression [t]here is unlikely to be any legitimate state interest justifying regulation . . . " (App. 87). For this reason the Court concluded that the Texas law:

> . . . as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. In addition to proscribing the mere possession of obscene material, Section 1 states that 'whosoever shall knowingly photograph, act in, pose for . . . print' etc. without any limitation that such activities be engaged in publicly or with the intent to publicly or commercially distribute the materials involved (App. 88).

The statute obviously intruded into the realm of privacy protected by the *Stanley* rationale. Cf. *Redmond* v. *United States,* 384 U.S. 264 (1966).

b. *The Statute Was Not Limited to Material Utterly Without Redeeming Social Value.*

The trial court concluded that the Texas statute was also deficient in its failure to restrict its sanction to material "utterly without redeeming social value," noting that *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966) required

such a finding before the protection of the First Amendment could be breached (App. 90).

The Attorney General asks "whether measuring obscenity by *Roth*[4] is still constitutionally valid or whether *Memoirs* is a new standard" (Appellants' brief, p. 17). The short answer is that this Court in *Roth* was explicit: "all ideas having even the slightest redeeming social 'importance" enjoy the protection of the First Amendment and obscenity can be suppressed only because it is deemed to be "utterly without redeeming social importance," 354 U.S. 484-85. The opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, does not appear to have departed from the *Roth* rationale but rather simply restates the governing principle. The *per curiam* opinion in *Redrup* v. *New York*, 386 U.S. 767 (1967) recognizes that a majority of the Court has adhered, albeit in separate opinions, "to a not dissimilar standard" holding:

> that a State may not constitutionally inhibit the distribution of literary material as obscene unless '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,' emphasizing that the 'three elements must coalesce,' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value.' 386 U.S. at 770-71.

[4] *Roth* v. *United States*, 354 U.S. 476 (1957).

Faithful to this admonition, the court below struck the Texas statute for its failure to require that the prohibited material be "utterly without redeeming social value." The Court acted in a context which highlighted the necessity for such a limitation. Two police raids, reminiscent of *Stanford* v. *Texas*, 379 U.S. 476 (1965), were directed at the Plaintiff's residence, resulting in wholesale seizures of writing of all kinds, under the guise of enforcing the state obscenity statute. Neither the police responsible for the raids, nor the Assistant District Attorney who passed the opinion that the newspaper was obscene, nor the magistrate that issued the first warrant felt required to appraise the allegedly obscene material to determine whether it was "utterly without redeeming social value." The police officer and the District Attorney focused their attention on certain portions of a sixteen page newspaper (App. 64, 69, 70; Snider Deposition, pp. 55-58); the magistrate did not even see a copy of the newspaper before authorizing the search and seizure (App. 64-65). In absence of the requisite limitation, the statute was constitutionally deficient.

c. *The Statute Was Overbroad Because It Reached Beyond Public or Commercial Dissemination.*

The court below sought a synthesis between the opinions in *Roth* and *Stanley* concluding that the State could legitimately regulate obscenity with respect to adults only in the "context of public or commercial dissemination" (App. 88). This rationale is consistent with the view that it is only "obtrusive" obscenity that may legitimately be regulated by the State. See, Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421, 449. It also harmonizes with the argument that obscenity can be banned "only when it creates a nuisance to others, when it

intrudes upon their own autonomous monitoring of their emotional and intellectual intake. . . . In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will." *The Supreme Court 1968 Term*, 83 Harv. L. Rev. 7, 153 (1969). Such formulations, however, are not essential to sustain the lower court's action, which can be sustained on the narrow basis that the Texas statute punished mere private possession of obscene material.

d. The Statute Denied Equal Protection.

Even if the Texas statute were otherwise sound, its unlimited exemption of "any daily or weekly newspaper" (App. 80) is a clear denial of equal protection.

The Court below refused to "pass upon" this contention (App. 92). Nevertheless this infirmity would require invalidating the statute, certainly insofar as it applied to Stein, the publisher of a bi-monthly paper (App. 59). "Since the classification here touches on the fundamental right [of free press and speech], its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 22 L. Ed.2d at 617 (1969); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). There is no conceivable, much less compelling, interest that justifies the exemption of daily and weekly newspapers and the application of the statute to bi-monthly papers.

II.

The plaintiff chose an appropriate means to enforce his constitutional rights.

> . . . wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication . . . *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

Stein's plight reaffirms both the validity and the necessity of the *Dombrowski*[5] principles. For defense in the state court of the pending criminal cases afforded no guarantee against repetition by the Dallas police of their unlawful raids. To await vindication in the state courts of Stein's rights would have assured a demise of the newspaper,[6] and a permanent chilling of free expression.

Stein was victimized by general searches of his personal possessions,[7] seizure of allegedly obscene newspapers without prior judicial review of the material,[8] and subjected to

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[5] *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

[6] A motion to suppress was presented in the first of the state criminal cases in February 1969, it was finally granted in October 1969. Defendant's motion to dismiss the second charge remains pending.

[7] Compare *Stanford* v. *Texas*, 379 U.S. 476 (1965). As police officer Monaghen testified (App. 74), "I didn't know what to seize and what not to seize so I just took everything."

[8] Compare *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). As previously noted, on the first search the magistrate issuing the warrant was not shown a copy of the allegedly obscene newspaper. On the second search the officers operating under the guise of a marijuana warrant seized allegedly obscene newspapers, posters and the typewriters, etc. that they considered to be instrumentalities of the crime (Snider Deposition 47).

arrest and prosecution under an overbroad state statute which impinged upon his First Amendment rights.[9] Stein suffered these abuses because of his publication of a newspaper which offended the Dallas authorities.

In the 18th century when "the King's messengers . . . ransacked Entick's home . . . and carted away quantities of his books and papers . . . . Lord Camden declared the warrant to be unlawful . . . 'His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction . . .'" *Stanford v. Texas*, 379 U.S. 476, 483-4 (1965). Stein's home was similarly "ransacked" twice within a two week period. Our society cannot tolerate such misuse of power for "[o]ur touchstones are that acceptable limitations must neither affect the impartial distribution of news and ideas . . . nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150-51 (1967).

d. The Court Properly Declined to Abstain.

The Attorney General's suggestion that Stein should have pursued some ephemeral state remedies[10] ignores the grav-

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[9] *See Stanley v. Georgia*, 394 U.S. 557 (1969). In fact the Dallas Police treated as obscene the use of "four (4) letter words" (App. 10, Snider Deposition 58), failing to distinguish between that which might offend and that which is prurient. See a timely opinion by Judge Aldrich in *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), making this essential distinction.

[10] The Attorney General departs from the record to assert "Stein could and should have sought . . . a dismissal of the charges in the state courts of Texas . . ." (Appellants' Brief, p. 29).

ity of the threat to Stein's right to publish and the public's right to receive. *Zwickler* v. *Koota* teaches us that the "judge-made doctrine of abstention . . . sanctions such escape only in narrowly limited 'special circumstances,'" 389 U.S. at 248. This judge-made doctrine of abstention is inappropriate in a challenge that a state statute is overbroad and is "not fairly subject to an interpretation which will avoid or modify the federal constitutional question." *Id.* at 251. Clearly abstention is not appropriate here for "cases involving vital questions of civil rights are the least likely candidates for abstention," *Wright* v. *McMann*, 387 F.2d 519, 525 (2d Cir. 1967), recognizing that the "objectives of the Civil Rights Act" would be defeated if claims under the Constitution "would have to stagnate in the federal court until some nebulous remedy was pursued like a will-o-the-wisp in the state court." *Ibid.*; see *Kirkland* v. *Wallace*, 403 F.2d 413 (5th Cir. 1968). Inasmuch as abstention "operates to require piecemeal adjudication" the result is "quite costly" where, as here, "the state statute may inhibit the exercise of First Amendment freedoms." *Baggett* v. *Bullitt*, 377 U.S. 360, 378-9 (1964). Finally, the "abstention doctrine is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression or as applied for the purpose of discouraging protected activities," *Dombrowski* v. *Pfister*, 380

Inasmuch as the matter has been raised we would like to put it to rest. A motion to suppress evidence and to dismiss the charge was filed, presented and briefed in 68-3977-C in the County Criminal Court No. 3 of Dallas County, Texas in February, 1969. Finally on October 16, 1969 the motion to suppress was granted and the case was dismissed. The second criminal charge remains pending in the Dallas County Criminal Court on defendants' motion to dismiss. To date we have not been advised of any action on the motion.

U.S. 479, 489-90 (1965). See generally, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969).

Finally, "the doctrine [of abstention] contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965), quoted with approval in *Reetz* v. *Vozanich*, No. 185, Oct. Term 1969, slip op. 4, decided February 25, 1970. In the present case there was no uncertainty as to the state statute which on its face punished mere possession of obscenity and had been so construed by the Texas appellate court. *Sullivan* v. *State*, 401 S.W.2d 246 (Tex. Crim. App., 1966).

b. *Injunctive Relief Against Future Arrests and Prosecution Was Appropriate.*

The lower court simply enjoined future arrests or prosecutions under the invalid Texas obscenity statute. It did not purport to prevent the state from pressing the pending prosecutions.

Federal injunctions against unconstitutional police conduct were approved as early as 1939, *Hague* v. *CIO*, 307 U.S. 496 (1939), see generally, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 Yale L. J. 143 (1968). The federal "courts have the power to enjoin unconstitutional police practices. They are not always required to await criminal trials which may never materialize in order to vindicate crucial constitutional rights," *Gomez* v. *Layton*, 394 F.2d 764, 766 (D.C. Cir., 1968); *Wolin* v. *Port of New York*, 392 F.2d 83 (2d Cir., 1968), *cert. denied*, 393 U.S. 940.

Federal injunctions against state prosecutions date back to the "fountainhead" of *Ex Parte Young*, 209 U.S. 123

(1908). No statute bars injunctive relief against future prosecutions, for 28 U.S.C. Section 2283 "only bars stays of suits already instituted," *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, n. 2 (1965) and "restraints upon future prosecutions are beyond the reach of 2283" *Baines* v. *City of Danville*, 337 F.2d 579, 595 (4th Cir., 1964), *cert. denied*, 381 U.S. 939.

Stein's uncontroverted affidavit in support of summary judgment asserted an intention to continue publication of the "Dallas Notes" and "to continue to include in the newspaper material similar to that contained in the previous issues . . . which have been characterized by the Dallas police, the District Attorney's office, as constituting obscenity in violation of Article 527 . . ." (App. 61). Stein's pleadings alleged a fear of future arrests and prosecutions under Article 527 (App. 37), a manifestly reasonable apprehension in light of his experience with the Dallas authorities. The State expressed no willingness to change its future treatment of Stein. On these facts the Court properly enjoined future arrests and prosecutions under the Texas statute, a statute which is admittedly overbroad, and trenches upon protected constitutional freedoms. Not only did the trial court have before it the "facially" unconstitutional statute but the "gloss" of police enforcement of the statute in a manner that could not be tolerated. If *Dombrowski* has two branches[11] or but a single strand it

[11] *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev., 809, 813 (1969). "This holding has two branches. Under the first, whether a federal court will hear a suit for declaratory or injunctive relief depends on whether the statute is unconstitutional on its face. . . . Once the law is deemed unconstitutional on its face, the issues of bad faith and threatened prosecution should be irrelevant. . . . Under the second branch of the *Dombrowski*

does not matter. The circumstances of this case satisfy all requisites for injunctive relief. The Texas obscenity statute was properly challenged as "overly broad and vague regulations of expression," *Cameron* v. *Johnson*, 390 U.S. 611, 618 (1968). In addition, although the court below did not feel it essential to its determination (App. 85), evidence abounds that the Dallas police misused this statute to suppress a disfavored newspaper and harass its publisher.[12] Plaintiff Stein "justifiably attacked [Article 527 on its] face as abridging free expression, [and/] or as applied for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965).

In light of the continued threat of future arrests and prosecutions under Article 527, and recognizing that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), the prophylactic effect of injunctive relief was not only warranted but required. For where, as here, "the institutional interests in comity collide with the paramount institutional interests protected by the First Amendment, comity must yield." *Machesky* v. *Bizzell*, 414

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holding, whether a federal court will hear a suit for declaratory or injunctive relief depends on whether a *valid* statute is used for the purpose of discouraging protected activities."

[12] Both searches were carried out at night, all persons on the premises were arrested on both occasions, virtually everything on the premises including newspapers, typewriters and personal property were seized on both occasions without the slightest justification. Thus according to Officer Snider, when the officers came back on the second raid and found Stein back in publication they "cleaned house again" (App. 72); as Officer Monaghen put it in explaining why he seized a poster of Mao Tse-tung, "I didn't know what to seize and what not to seize so I just took everything," (App. 74).

F.2d 283, 291 (5th Cir., 1969); *Sheridan* v. *Garrison,* 415 F.2d 699 (5th Cir., 1969).

c. *The Declaratory Relief Was Proper.*

If the trial court correctly enjoined future arrests and prosecutions under Article 527, assuredly the declaratory judgment invalidating the statute was in order. However, even if the trial court erred in granting injunctive relief, the declaratory judgment was proper.[13] For a "request for a declaratory judgment that a state statute is overbroad on its face must be considered independently [and] . . . . a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Zwickler* v. *Koota,* 389 U.S. 241, 254 (1967).

The standards that govern the availability of declaratory relief are significantly less stringent than those that determine the propriety of an injunction against enforcement of a state statute. An action "for declaratory relief . . . involves none of the dangers to which Congress was addressing itself" in enacting Sections 28 U.S.C. §§2282 and 2283. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 155 (1963). Declaratory relief alone would have left the state of Texas "free to continue to apply the statute," pending final review of the trial court's order. *Ibid.* The considerations of comity that militate against use of injunctive relief are not persuasive as to declaratory relief, for in adopt-

[13] Apparently the Attorney General does not question the propriety of the declaratory judgment as a procedural matter. At least we find no suggestion in its brief that declaratory relief was not in order, if one assumes the Texas statute was unconstitutional.

ing the declaratory judgment act Congress specifically recognized that "much of the hostility to the extensive use of the injunction power by the Federal Courts will be obviated by enabling the Courts to render declaratory judgments," *Sen. Rep.* 1005, 73rd Cong. 2d Sess. (1934).

Clearly Section 2283 does not prohibit the granting of declaratory relief, nor do principles of comity otherwise inhibit the use of declaratory relief under such circumstances. Implicit in this Court's opinion in *Cameron* v. *Johnson*, 390 U.S. 611, 615 (1968) is the recognition that declaratory relief with respect to the constitutionality of a state criminal statute may be available in the federal court despite the pendency of prosecutions under the statute. See *Kirkland* v. *Wallace*, 403 F.2d 413, 415 (5th Cir. 1968). Unless declaratory relief is available under such circumstances, it may not be otherwise available. Once pending criminal charges are dismissed there may no longer exist an adversary "controversy" of sufficiently substantial nature to satisfy the statutory requisites. *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd* 386 U.S. 10. In absence of a pending prosecution or the immediate threat thereof, there is thus no "concrete fact situation" and declaratory relief is unavailable because of the court's unwillingness to issue an "advisory opinion." *Zemel* v. *Rusk*, 381 U.S. 1, 20 (1965). While the criminal charges are pending, declaratory relief is appropriate for all the statutory requisites exist, i.e. "defined rights and a definite threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 92 (1947).

CONCLUSION

Appellee respectfully submits that the decision of the trial court should be affirmed.

Respectfully submitted,

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March 3, 1970